No. 89-7260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM J. BURNS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

---

REPLY BRIEF FOR THE PETITIONER

STEVEN H. GOLDBLATT*
BETH E. COOK
CYNTHIA S. MAZUR
Georgetown University Law Center
Appellate Litigation Program
111 F Street, N.W.
Suite 123
Washington, D.C. 20001-2095
Telephone: (202) 662-9555
**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

ARGUMENT

I. WHETHER VIEWED AS MANDATED BY STATUTE OR BY PROCEDURAL DUE PROCESS, THE NOTICE THAT PETITIONER SEEKS: A) WILL BE NECESSARY ONLY IN A SMALL PERCENTAGE OF CASES; B) IS ESSENTIAL TO EFFECTUATE THE CONGRESSIONALLY-CREATED RIGHT TO COMMENT BEFORE SENTENCE IS IMPOSED; AND C) WILL NOT BE BURDENSOME FOR LOWER FEDERAL COURTS TO ADMINISTER

The Government asserts that Rule 32(a)(1) of the Federal Rules of Criminal Procedure ("Rule 32(a)(1)") does not require notice because the language granting the defendant "an opportunity to comment upon . . . matters relating to the appropriate sentence" does not specifically state that the judge must give advance notice of a departure, and, therefore, the Court should not fashion a notice requirement. Respondent's Brief at 6. To support this contention, the Government overstates Burns' position by claiming that he argues that Rule 32(a)(1) requires a "pre-hearing statement of the court's reasons for its sentence." *Id.* at 13. In response to this distortion, the Government sounds the alarm that Burns' position would require a "wholesale revision in the way sentencing is conducted in this country." *Id.* at 6. The Government's fears are unfounded.

Burns is not asking this Court to impose a general requirement that the judge preview the sentence that he or she intends to impose. Rather, he argues that notice is required when the judge alone is aware that a departure is being considered. The judge only has to provide notice when he or she is considering a departure based upon grounds not identified either in the presentence investigation report ("PSI report") or by the parties.

This notice requirement does not have the broad ramifications that the Government claims it has. Con-

gress intended that "most cases [would] result in sentences within the guideline range . . . ." S. Rep. No. 225, 98th Cong., 1st Sess. 52, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3235 ("Senate Report"). The United States Sentencing Commission estimates that only 12.2% of all sentences involve departures. United States Sentencing Commission, *Annual Report* 47 (1989). Moreover, the probation officer is directed to include in the PSI report an explanation of any factors that *may* indicate that a departure is warranted. Fed. R. Crim. P. 32(c)(2)(B). Thus, considering that either the PSI report or the parties themselves should identify any grounds for departure, judges will be required to provide notice of a possible departure only in a relatively small number of cases.

The Government also repeatedly characterizes both Burns' statutory and due process arguments as requiring this Court to engraft a "notice and comment" requirement upon Rule 32(a)(1). *See, e.g.*, Respondent's Brief at 5, 15, 19. In a footnote, however, the Government acknowledges that Congress itself created the right to comment. *Id.* at 24 n.9. The Government's interpretation of the significance of the "comment" language is suspect, however, because it would needlessly render that language superfluous.[1]

The Government asserts that the "comment" language:

> was added to make clear that the defendant was entitled to address any points made in the probation officer's report; the reference to 'other matters relating to the appropriate sentence' was added to avoid

[1] This Court will try to give meaning to every word of a statute, and not render any provision superfluous. *Bell* v. *New Jersey*, 461 U.S. 773, 788-89 (1983); *Bowsher* v. *Merck & Co.*, 460 U.S. 824, 833 (1983).

> the possible inference that the right to comment was somehow *limited* to the contents of the probation officer's report.

Id. at 24 n.9 (emphasis in original). This rationale, however, fails to take into account Rule 32(c)(3)(A), which requires the court to give "the defendant and the defendant's counsel an opportunity to comment" on the PSI report. The language in Rule 32(a)(1), therefore, was not needed to make clear that the defendant was entitled to address points made in the PSI report. Rather, the language of subdivision (a)(1) could only have been intended to emphasize the defendant's right to comment on matters related to the appropriate sentence that were *not* raised in the PSI report. Burns' interpretation of Rule 32(a)(1), shared by the overwhelming majority of the courts of appeals,[2] is the only reading that gives effect to each word in the statute.[3]

[2] *See* Petitioner's Brief at 12-13 n.4. The Government quibbles with petitioner's statement in footnote 4 of his brief that the First Circuit has recognized an implied right to notice of a departure from the Guidelines in *United States* v. *Hernandez*, 896 F.2d 642 (1st Cir. 1990). Respondent's Brief at 18 n.8. In *Hernandez*, the court stated that "a criminal defendant must have notice of any facts that will affect his sentence and a meaningful opportunity to respond . . . ." *Hernandez*, 896 F.2d at 644. In *Hernandez*, this opportunity to respond was provided by the trial judge when he invited counsel to comment on whether a departure would be appropriate. *Id.* at 643-44. Moreover, both the Eighth Circuit and the Fifth Circuit have interpreted *Hernandez* to require that the defendant must have either notice of the factors that may support departure or an opportunity to contest the departure decision. *United States* v. *George*, No. 89-7119 (5th Cir. Sept. 5, 1990) (1990 WL 126637, at 10) (to be reported at 911 F.2d 1028); *United States* v. *Sands*, 908 F.2d 304, 306 (8th Cir. 1990).

[3] In its analysis of the legislative history, the Government claims that Congress did not intend appellate courts to undermine the discretion of sentencing judges by "imposing procedural burdens that

Next, predicting "procedural chaos," the Government posits that a notice requirement in departure cases will generate "[e]xtended litigation" and burden the courts with "the task of fashioning an uncodified body of sentencing rules . . . ." Respondent's Brief at 25-26. These concerns are belied by the fact that there has not been a deluge of procedural problems in those circuits that have recognized the notice requirement.[4] Because the Government is a party in all federal sentencing cases, it presumably would be aware of any "procedural chaos" occurring in the district courts in those circuits. The Government's inability to point to any concrete examples of problems arising from the notice requirement is substantial evidence that no such problems exist.[5]

The first procedural quandary posed by the Government is "whether . . . notice is required before downward departures." Respondent's Brief at 25. That issue is readily answered by the plain language of Rule 32(a)(1), which gives "[t]he attorney for the Government . . . an equiv-

---

Congress did *not* require." Respondent's Brief at 21 (emphasis in original). Again, this argument is based on the false premise that Congress did not mandate a "comment" provision in Rule 32(a)(1).

[4] The Second, Fifth and Ninth Circuits have all recognized the notice requirement since mid-1989 or earlier. *See United States* v. *Cervantes*, 878 F.2d 50, 55-56 (2d Cir. 1989); *United States* v. *Nuno-Para*, 877 F.2d 1409, 1415 (9th Cir. 1989); *United States* v. *Otero*, 868 F.2d 1412, 1415 (5th Cir. 1989).

[5] The Government's concern over "procedural chaos" has not prevented it from appealing the district court's failure to give notice of a downward departure on at least two occasions. *United States* v. *Jagmohan*, 909 F.2d 61, 63 (2d Cir. 1990); *United States* v. *Goff*, 907 F.2d 1441, 1446 n.4 (4th Cir. 1990). The decision to file these appeals under the Guidelines required the approval of either the Solicitor General or the Attorney General. 18 U.S.C. § 3742(b) (1988).

alent opportunity to speak to the court." Therefore, the parties have an equal entitlement to notice of this type. *United States* v. *Jagmohan*, 909 F.2d 61, 63 (2d Cir. 1990) (extending notice rule to Government in context of downward departure).

Second, the Government claims that it would be difficult to determine what matters would be subject to the notice requirement. It then reproaches Burns for suggesting that notice could be limited to "matter[s] critical to the sentencing process." Respondent's Brief at 25. Burns offered no such limitation and the quote is taken entirely out of context. Petitioner's Brief at 8. Rule 32(a)(1) plainly states that the parties must be given an opportunity to comment upon "other matters relating to the appropriate sentence." This language is comprehensive and unambiguous, and federal judges will experience little difficulty determining whether they must alert the parties to such matters.

Moreover, other than cases involving unexpected departures, few situations will arise where the parties legitimately can claim that they were deprived of notice. The Government expresses concern that Rule 32 might be interpreted to require notice of factors not contained in the PSI report, but which influence the judge to impose a sentence at the high end of the applicable guideline range. This situation is unlikely to occur. Generally, the factors that influence the sentencing decision are the same factors that determine the appropriate guideline range. *See generally* United States Sentencing Commission, *Guidelines Manual*, ch. 1-3 (1988); Petitioner's Brief at 5 n.2. Under Rule 32, the parties actively participate in the factual analyses that determine the correct guideline range. Rule 32(c)(3); Petitioner's Brief at 17-18. The parties, therefore, are necessarily on notice of the facts used

to determine the applicable guideline range, and, if the judge sentences within that range, the potential for surprise is remote, even if the sentence imposed is at the high end of the range.

The dearth of case law in this area suggests that requiring notice of a possible departure will not lead to a more general rule that judges must give advance notice of the factors influencing a sentence at the high end of the applicable guideline range. In the only reported case on point, the Sixth Circuit, which later held that notice was required in the departure context,[6] rejected a claim that the defendant needed notice that the judge considered 92.9% pure cocaine to be unusually pure before imposing sentence within the guideline range. *United States* v. *Ford*, 889 F.2d 1570, 1572 (6th Cir. 1989).

The third concern raised by the Government is how courts will determine when notice of a possible departure must be given. Respondent's Brief at 25-26. No circuit has concluded that notice of a possible departure necessarily must be given in advance of the sentencing hearing. Rather, the courts have held that notice and an opportunity to comment must be given prior to the imposition of sentence.[7] Giving notice in advance of the hearing would

---

[6] *United States* v. *Anders*, 899 F.2d 570, 576-77 (6th Cir. 1990).

[7] *See, e.g., George*, 1990 WL 126637, at 8-10 (to be reported at 911 F.2d 1028) (rejecting claim that the requirements of Rule 32(a)(1) were not satisfied because notice was not given prior to hearing); *United States* v. *Hedberg*, 902 F.2d 1427, 1428 (9th Cir. 1990) ("To satisfy the notice requirement, it is not necessary that the defendant be notified by the trial court of the possibility of an upward departure *prior* to the sentencing hearing.") (emphasis in original); *United States* v. *Williams*, 901 F.2d 1394, 1400 (7th Cir.), *petition for cert. filed*, (U.S. Oct. 1, 1990) (No. 90-5849) (Rule 32(a)(1) satisfied by identification of grounds for departure in "presentence report, *or* by the sentencing court at the defendant's sentencing hearing") (emphasis in original).

be the better practice, but notice given at the hearing would not necessarily deprive the parties of the right to comment.[8] Moreover, the risk that postponement may be necessary if notice is given at the hearing will encourage judges to give advance notice whenever possible. In any event, that risk is outweighed by the court's interest in hearing relevant information and prepared argument from counsel. United States Sentencing Commission, *Guidelines Manual*, §6A1.3 (1988). Also, because the Guidelines require judges to announce the specific reasons supporting a departure decision,[9] it is highly unlikely that the judge will initially consider a departure at the sentencing hearing;[10] therefore, it should not be burdensome to alert counsel to the possibility of departure in advance of the hearing.

Finally, the Government worries that "[t]he specificity of the notice would also be subject to dispute." Respondent's Brief at 26. On the contrary, the courts of appeals that have addressed this issue have had no difficulty deter-

---

[8] Petitioner strongly disagrees with the Government's claim that notice at the hearing will be of little value. Respondent's Brief at 13. Any opportunity to address the departure issue is critical to the interest of the defendant. Moreover, this Court should not assume that a postponement would be inevitable if the notice is given at the hearing. The need to postpone the proceeding would be determined on a case-by-case basis.

[9] Sentencing judges are required "at the time of sentencing . . . [to] state in open court . . . (2) . . . the specific reason for the imposition of a sentence" outside the guideline range. 18 U.S.C. §3553(c). The Guidelines thus compel judges to isolate and articulate the reasons supporting departure.

[10] In this case, the district court's production, less than two hours after the sentencing hearing, of a four-and-one-half page typewritten memorandum listing the reasons for departure indicates that the judge had made a tentative decision to depart well before the sentencing hearing. J.A. 63, 70-73.

mining whether the defendant was reasonably on notice of the departure. *See* Petitioner's Brief at 12-13 n.4. In sum, the Government's concern about the supposed difficulties involved in determining when and how notice must be given in departure cases is unfounded.

II. THE SENTENCING REFORM ACT OF 1984 CREATED A FEDERAL STATUTORY SENTENCING SCHEME PROFOUNDLY DIFFERENT FROM THE HIGHLY DISCRETIONARY SCHEME IT REPLACED. THE NEW SCHEME CREATES PROTECTIBLE INTERESTS IN THE MANNER IN WHICH SENTENCE IS IMPOSED AND THE LENGTH OF THE SENTENCE; THESE INTERESTS CANNOT BE SAFEGUARDED ADEQUATELY IF THE DEFENDANT IS NOT NOTIFIED BEFORE SENTENCE IS IMPOSED THAT A JUDGE IS CONSIDERING A DEPARTURE FROM THE GUIDELINE RANGE

The Government claims that "Congress's enactment of a guidelines sentencing system does not change the due process calculus," and that petitioner's claim is "no different in principle from one directed to an unexpectedly harsh but legal sentence imposed by a district court before the Guidelines took effect . . . ." Respondent's Brief at 10. The Government has chosen an appropriate pre-guideline comparison, but that comparison reveals profound differences in pre-guideline and post-guideline practice.

Before the Guidelines were implemented, the trial judge exercised almost unlimited discretion when imposing sentence. *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1238 (4th Cir.), *cert. denied*, 110 S. Ct. 346 (1989) (Wilkins, J.) ("[B]efore guideline sentencing a court intuitively fashioned what it considered an appropriate sentence and did so without any obligation to give reasons

and many times without ultimate resolution of disputed facts."). Generally, the length of the sentence imposed was not subject to any appellate review if the sentence was within statutory limits. *United States* v. *Tucker*, 404 U.S. 443, 446-47 (1972). Thus, under pre-guideline practice, the defendant in the Government's example entered the sentencing hearing with no indication of what the sentence would be (other than the statutory limits), and the judge was under no obligation to justify his or her decision. No matter how unexpectedly harsh the sentence, the result generally was unreviewable on appeal. *Id.* at 447.

The Guidelines were designed to alter this situation substantially. *Urrego-Linares*, 879 F.2d at 1238. Rule 32 now mandates that the defendant will be afforded the following procedural rights: 1) advance notice of the critical findings in the PSI report; 2) an opportunity to challenge the accuracy of those findings; 3) the right to introduce relevant evidence; and 4) the right to have the court make express findings of fact on important contested issues. Rule 32(c)(3)(A), (D).

The Sentencing Reform Act now requires the district court to consider imposing a sentence consistent with the guideline range and consistent with pertinent policy statements established by the Sentencing Commission. 18 U.S.C. § 3553(a)(4), (5). Judicial discretion is limited to the range mandated by the Guidelines unless a departure is justified because "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . . ." *Id.* § 3553(b). A decision to depart must be supported by "specific" reasons for the departure which must be stated in open court, *id.* § 3553(c)(2), and Congress intended that "most cases

[would] result in sentences within the guideline range," Senate Report at 52. The defendant has a right to appeal the sentence imposed, and the court of appeals must reverse unreasonable departures from the guideline sentencing range. § 3742(a), (f)(2).

Thus, by enacting the Guidelines, Congress has changed the due process calculus. It created a protectible expectation that: 1) the defendant will be sentenced within the applicable guideline range, except in unusual circumstances where a departure is justified; 2) the district judge will consider the PSI report in imposing sentence; and 3) the defendant will be afforded the right to comment on any relevant sentencing factors. Congress was not obligated to create these expectations, but having done so, a defendant cannot be deprived of his or her liberty interest without due process of law. *Greenholtz* v. *Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 12 (1979) (holding that a state statute created a protectible expectation of parole);[11] *Wolff* v. *McDonnell*, 418 U.S. 539, 557 (1974) ("the State having created the right to

[11] *Greenholtz* also holds that whether a statute or rule "provides a protectible entitlement must be decided on a case-by-case basis." 442 U.S. at 12. Thus, the Government's fear that petitioner's notice requirement would "cast constitutional doubts over [state] sentencing proceedings" is misplaced. Respondent's Brief at 15. Only those states with sentencing procedures that incorporate the same guideline requirements that Congress enacted would be affected by a ruling favorable to the petitioner. Respondent cites to no such sentencing schemes.

For similar reasons, the recognition that guideline sentencing must include notice of a possible departure has no broader application to other federal rules despite the Government's assertion to the contrary. *Id.* at 16 (referring to Rule 23(c) of the Federal Rules of Criminal Procedure and Rule 52 of the Federal Rules of Civil Procedure).

good time [credit] and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced" within the Due Process Clause).

The Government claims that even if the due process analysis is different under the Guidelines, the notice requested here is not a necessary ingredient of due process under the test announced in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). First, it argues that there is little risk of an erroneous deprivation of the defendant's interests because there are many other procedural protections provided by the Guidelines. Respondent's Brief at 12. Without any notice that departure is under consideration, however, these procedures do not protect the defendant's substantial interest in commenting on whether a departure from the guideline range is either permissible or appropriate.[12] Nor do the procedures provide a meaningful substitute for this protection.[13]

[12] The Government suggests that notice could not have been very important because, upon imposition of sentence, defense counsel addressed the court's order that Burns be taken into custody without mentioning the lack of notice of the departure. Respondent's Brief at 4, 23. This argument is not well taken. The district court foreclosed any discussion or objection to the sentence she imposed by directing Burns to "step back with the Marshal" immediately after she advised Burns of his right of appeal. J.A. 57. Counsel's failure to address the notice issue resulted from the fact that the judge had moved on to decide the next issue—when the sentence would commence.

[13] The Government's claim that notice was unnecessary in this case because Burns' counsel in fact made appropriate arguments regarding departure is incorrect. Respondent's Brief at 13. As the transcript of the sentencing hearing shows, counsel's argument was virtually irrelevant to the technical departure issues that concerned the judge. *Compare* J.A. 40-45 *with* J.A. 70-73.

The value to the defendant of notice of a departure is much greater than the Government is willing to acknowledge. When the Government argues that petitioner only seeks advance notice to "alert defense counsel to appeal [] more generally to the judge's discretion not to make an upward departure or to make at most only a slight departure," Respondent's Brief at 13, the Government seriously misperceives the reasoning in *United States* v. *Kim*, 896 F.2d 678, 681 (2d Cir. 1990). *Kim* points out that counsel's legal strategy at the sentencing hearing will be "quite different[]" if counsel knows that an upward departure is contemplated, *id.*; this knowledge will allow counsel to focus on the technical issues that control the departure decision. *See* Petitioner's Brief at 30-31.

Ultimately, the amount of process that is due depends on what process is needed to minimize the risk of error. *Greenholtz*, 442 U.S. at 12-13 (citing *Mathews*, 424 U.S. at 335). Only with notice can the parties provide the type of input in the sentencing decision that Congress deemed essential to minimize the risk that inappropriate sentences would be imposed. Thus, when the judge alone has recognized a basis for departure from the guideline range, due process requires that he or she notify the parties of that possibility. *See United States* v. *Sanchez*, 908 F.2d 1443, 1446 (9th Cir. 1990) ("Because a defendant is accorded an adequate opportunity to assist the district court in arriving at its sentencing decision [including receiving notice of factors which were not identified in the PSI report as possible grounds for departure], the Sentencing Guidelines are procedurally sufficient to survive due process scrutiny under the balancing test of *Mathews* v. *Eldridge*"); *United States* v. *Brittman*, 872 F.2d 827, 828 (8th Cir.), *cert. denied*, 110 S. Ct. 184 (1989) (denying defendant "an appropriate opportunity to contest the

facts bearing upon the various predicate factors that the Guidelines make relevant to sentencing" may violate due process).

CONCLUSION

For the foregoing reasons, as well as those stated in petitioner's opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted,

STEVEN H. GOLDBLATT*
BETH E. COOK
CYNTHIA S. MAZUR
Georgetown University Law Center
Appellate Litigation Program
111 F Street, N.W.
Suite 123
Washington, D.C. 20001-2095
Telephone: (202) 662-9555

**Counsel of Record*